United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. & Affidavit
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76-1581
76-1582

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To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1581, 76-1582

UNITED STATES OF AMERICA,
Appellee,

—against—

SALLY DI STEFANO and LINDA DI STEFANO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Sally Di Stefano and Linda Di Stefano appeal from judgments of the United States District Court for the Eastern District of New York (Platt, *J.*), entered November 26, 1976 and October 22, 1976, respectively, convicting appellants, after a jury trial, of bank robbery and conspiracy to rob a bank.[1] Title 18, United States Code, Sections 2113, 2 and 371. Sally Di Stefano was sentenced to concurrent six year prison terms pursuant to

[1] The indictment against appellants (76 Cr. 389) charged them with three separate crimes arising from the robbery of the Chemical Bank in Centereach, New York on May 28, 1976. Counts one and two were derived from Section 2113, i.e., Count One the "(a)" count, Count Two the "(d)" count. Count Three was the conspiracy count. Sally Di Stefano was found guilty on all three counts. Linda Di Stefano was found guilty on Counts One and Three and not guilty on Count Two.

18 U.S.C. § 4205(b)(2) on each of two bank robbery counts; a concurrent 5 year prison term was imposed on the conspiracy count. Linda Di Stefano was sentenced to a period of observation and study pursuant to the Youth Corrections Act, 18 U.S.C. § 5010(e). The sentence of each appellant has been stayed pending the determination of this appeal.[2]

On this appeal, Sally Di Stefano urges reversal of her conviction on various grounds: admission into evidence of materials illegally seized from her home and person; improper admission into evidence of a tainted eyewitness identification; inadequate representation by assigned counsel; and other aspects of the case are objected to by Sally Di Stefano personally and set forth by her appellate counsel "without comment." Appellant Linda Di Stefano urges reversal on different grounds: the evidence against her was insufficient to withstand a motion for a judgment of acquittal; the Court erred in its charge on false exculpatory statements; and that destruction by an FBI agent of rough interview notes, written at the time appellant made a false exculpatory statement, adversely affected her right to a fair trial.

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[2] Patrick Edwards, who pleaded guilty and testified against the appellants was sentenced on December 10, 1976 to an indeterminate period of incarceration not to exceed 10 years pursuant to 18 U.S.C. § 4253. Ronald Blanda, the fourth co-defendant, was killed on July 23, 1976 on the eve of trial at the Metropolitan Correctional Center in New York City. Since Sally Di Stefano has raised Mr. Blanda's death as an issue, we note that the FBI has concluded that Mr. Blanda, who was not cooperating with the Government, died in an altercation with another prisoner and that his death was entirely unrelated to this case.

Statement of the Case

A. The Suppression Hearing

Prior to trial, a suppression hearing was held on Sally Di Stefano's motion to suppress a bank bag seized at her home and $223 in currency seized from her person. Both items were obtained by FBI and Suffolk County officers at the time of Sally Di Stefano's arrest on June 2, 1976. At the hearing, FBI agent Lawrence Sweeny, testified that the arrest of Sally Di Stefano followed by a couple of hours a statement by one Patrick Edwards to the FBI on June 2, 1976 implicating Sally in the bank robbery that had occurred five days earlier. The statement by Edwards, one of the two men who robbed the bank, was corroborated by other information in the possession of the FBI on June 2, 1976.[3] (48-49, 57).[4] After obtaining Edward's statement, agent Sweeney and Suffolk County police officers proceeded to Sally Di Stefano's home in Centereach, New York, where the arrest took place. The officers knocked on the door and were let in by either Sally Di Stefano or her child. Although it was 12:30 or 1:00 Sally Di Stefano was wearing a nightgown and bathrobe. (61, 63). Accordingly, Roseanne Christie, a Suffolk County police detective, accompanied Sally to the bedroom where she could get dressed. While in the bedroom, Sally went to her wardrobe closet to take out a dress. Detective Christie, who could not view the closet or Sally's movements without entering the

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[3] The FBI had information through eye-witnesses that the car used by the bank robbers was driven to the bank by a woman; they also knew that Sally Di Stefano was a close friend of Edwards and Ronald Blanda.

[4] References are to the transcript of the trial unless preceded by the letter "H" which refers to a hearing on the validity of the pre-sentence report on Sally Di Stefano. This hearing was held on November 26, 1976, prior to Sally Di Stefano's sentencing.

room, entered and saw on the floor of the closet, in plain view, what appeared to be a bank money bag. (17, 18, 27). Detective Christie reported the presence of the bag to other officers and the bag was subsequently seized by the Suffolk County police. In addition, while in the bedroom, Sally Di Stefano took $223 and handed the money to Detective Christie. She stated to Detective Christie that the currency was "food stamp money" and requested its return. (44). The defendant called no witnesses at the hearing.

After the hearing, the Court credited the testimony of the Government witnesses and found that Detective Christie was properly in the bedroom as a security precaution and saw the bank bag in plain view. Thereupon, the suppression motion was denied. (81-83).

B. The Government's Case

Patrick Edwards testified that he had known Sally Di Stefano since his school days and, through her had become acquainted with her sister, Linda Di Stefano. Edwards had also become a close acquaintance of one Ronald Blanda, who was transported daily with Edwards to a Suffolk County methadone treatment center. Blanda, Edwards and Linda Di Stefano were frequent visitors to Sally Di Stefano's residence and, occasionally, would visit there together. (104-08).

Several months prior to May 28, 1976, the date of the robbery, Edwards and Blanda began discussing the idea of a bank robbery. Blanda stated that the Chemical Bank at 1176 Portion Road in Holtsville, New York, where he was a customer, would be a good bank to rob. Approximately one month before the robbery, Blanda took Edwards to the bank to look it over. At about the same

time, Edwards, with Blanda's approval, sawed off part of the barrel of a shotgun which was owned by Edwards. (109-111).

Thereafter, the bank robbery plans coalesced quickly. Shortly prior to May 28, Blanda showed Edwards a newspaper clipping concerning a May 25, 1976 bank robbery at the European-American Bank in Centereach, New York. Blanda told Edwards that he (Blanda) had committed this robbery. In the aftermath of this announcement, Edwards awoke at his Lake Ronkonkoma, New York residence on May 28, to find Blanda sitting in his parlor. During their accustomed ride to the methadone center, Edwards and Blanda decided to rob the Chemical Bank that day. The sawed-off shotgun was picked up at Edwards' residence and they telephoned to Sally Di Stefano's house. (112-14).

Edwards and Blanda then walked to the nearby Lake Ronkonkoma train station where they were met by a car containing Linda Di Stefano and one Mary Lou Morra, a maid employed by Sally Di Stefano. On the ride from Lake Ronkonkoma to Sally's residence, the conspirators "wanted to check the bank out one last time to see if there was a guard there or if the counters had been moved or changed." One of the men, at a point Edwards could not recall, told Linda Di Stefano to go into the bank, under the pretext of getting change, to see if the "bank had a camera or a guard . . . ." (114-115). Linda took a dollar from one of the men, went into the bank, and returned to the car and "indicated everything was the same, there was no guard and the cameras were in the same position." (116). The group thereupon proceeded to Sally Di Stefano's residence, at which time Mary Lou Morra and Linda Di Stefano dropped out of sight.

At her house, Sally Di Stefano aided Edwards and Blanda in assembling disguises for the robbery. A big "floppy" hat and pantyhose stockings for masks were found and used. She then borrowed a car from a friend named Philip Boyle and drove Edwards and Blanda to Suffolk Community College where false license plates were put on the car. (118-22). After this stop, all three drove to the bank where she waited in the car, while Edwards, with his gun, covered the bank floor and Blanda took some currency from the tellers, including a $50 bag of pennies. Sally Di Stefano crouched between the two men in the front seat as Blanda drove the car away from the bank.[5] (122-26).

The group made two quick stops after leaving the bank: the Community College where the false license plates were ripped off, and Sally's brother's house where clothing was changed. (128). The final stop was at Blanda's mother's house where Edwards and Blanda hid the gun and divided the money while Sally took the car back to Boyle. Seven hundred dollars in one and two-dollar bills were set aside for Sally who returned by taxi. (129, 133).

Thereafter, Edwards, Blanda, Sally Di Stefano and another friend of Edwards went to Manhattan where cocaine was purchased and used that night by the entire group. Edwards saw Sally Di Stefano hand Blanda a "stack of singles" for the purchase of cocaine. (141-2). Edwards and Blanda were later arrested on June 2, 1976 and Edwards immediately began cooperating with the FBI. (140-44).

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[5] A hubcap fell off the getaway car and was recovered by the FBI. This hubcap matched the three remaining hubcaps of Philip Boyle's car, which vehicle was found by the FBI a few days after the robbery to be missing a hubcap. (364-65).

Edwards' testimony was fully corroborated at the trial. The bank's head teller and others remembered the robbery similarly to the way Edwards had described it. (246-50, 257-60, 268-70). The robbery car seen by bank witnesses matched the description of Boyle's car. (267-70, 271-73). Boyle testified that he had, indeed, loaned his car to Sally Di Stefano on the day and time of the robbery. (312-15). The license plates of the car had been observed and the number matched that of plates which had been stolen from a Suffolk County resident visiting Sally's next door neighbor in February, 1976. (269-70, 272-73, 290-92, 363-64). One witness testified that Sally's appearance approximated that of the woman who had been seen in the car. (259-60). The bank bag seized at Sally's residence on June 2, 1976 was similar to the bag of pennies that was stolen from the bank: bank records reflected such a loss. (252-53). In addition, it was established that Sally Di Stefano possessed $223 in cash on June 2, 1976. (343).

Lastly, with respect to Linda Di Stefano, there was also substantial corroboration of Edwards' testimony. Through the testimony of the head bank teller, the jury learned that Linda's scouting mission had accomplished its purpose: Blanda crouched down while in the teller's area and was in a position to avoid being photographed by the bank cameras. (247-48). Mary Lou Morra testified that she had picked up Blanda and Edwards with Linda Di Stefano on the morning of the robbery and that Linda had been sent into the bank for change. When the group returned to Sally's house, Mary Lou Morra saw that Sally Di Stefano was present. (301-06). This testimony directly contradicted a statement made by Linda Di Stefano shortly after her arrest on June 2, 1976, which was introduced into evidence as a false exculpatory statement: Linda had stated that she recalled May 28, 1976 and had spent the day with her parents. She said

that she was not at the bank, nor was she ever with Edwards, Blanda and Sally Di Stefano on that day. (369-71).

C. The Defense Case

Neither defendant testified in her own behalf. However, Sally Di Stefano called two witnesses: A next-door neighbor testified that she saw Sally being carried out of the house by police officers on the day of her arrest. (410). An employee of the Suffolk County Department of Social Services testified that records of the Department showed that Sally Di Stefano received $200 a month in public support payments which would normally arrive at her residence at approximately the first of each month. (430-31). Linda Di Stefano called no witnesses.

ARGUMENT

POINT I

The Court Properly Admitted Into Evidence The Bank Bag And Currency Obtained From Sally Di Stefano on the Day of Her Arrest.

Appellant Sally Di Stefano challenges the ruling of the trial judge admitting into evidence the bank bag and currency seized from her on the day of her arrest. Appellant raises several grounds in support of her argument: (1) there was insufficient probable cause to justify her arrest because Edwards had no history as a reliable informant; (2) that the officers did not properly announce themselves before entering Sally's house; (3) that there were no "exigent circumstances" to justify a warrantless entry; (4) that seizure of the bank bag was a product

of a search not properly incident to arrest; and (5) that Detective Christie was not justified in entering the bedroom where she observed the bank bag.

At the outset it should be observed that only the last argument was urged by defense counsel at the pre-trial suppression hearing. (80-81). Prior to that hearing, defense counsel stated that "there was no search warrant," but did not argue that exigent circumstances for a warrantless entry were lacking. (11). Similarly, though defense counsel did cross-examine the FBI agent on probable cause, the grounds now asserted on appeal, the question of probable cause was not raised. Nor did counsel raise below the question of proper procedure of entry and search incident to arrest. Indeed, the record shows that counsel relied primarily on an attack upon the credibility of Detective Christie. (80-81). Because this Court has held that "failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground," *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976) we submit that appellant is precluded from raising on this appeal all but the one issue actually presented to the trial court—the right of the Detective Christie to be in the position she was in after the arrest at the time she saw the bank bag.

But even if all of appellant's arguments are not held to have been waived, they are, we submit, without merit. There is no requirement, as appellant asserts, that where probable cause to arrest is based on information supplied by an eyewitness informant that that informant have a known history of reliability. Indeed, this Court recently has held that a statement of an accomplice or eyewitness to a crime need not meet such a test, especially when corroborated, as here, by other information in the hands of the police. *United States* v. *Rueda*, Slip op. at 1765 (2d Cir. February 10, 1977); *United States*

v. *Rollins*, *supra* at 164-65. We submit that the information from Edwards, amply corroborated by information possessed at the time of Sally Di Stefano's arrest, was more than adequate to establish probable cause. See *United States* v. *Edmonds*, 535 F.2d 714, 720 (2d Cir. 1976); *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972). The cases cited by appellant, e.g., *Draper* v. *United States*, 358 U.S. 307 (1959); *Recznick* v. *Lorain*, 393 U.S. 166 (1968), are simply inapposite since they involve the question of probable cause based on information supplied by professional informants.

Neither is appellant correct in arguing that the police officers unlawfully entered Sally's house. A law enforcement officer may arrest a person without a warrant in a private dwelling if the officer has reasonable cause to believe that such a person has committed a felony, whether exigent circumstances exist or not. *United States* v. *Watson*, 425 U.S. 411, 422 [1976]. In *United States* v. *Price*, 345 F.2d 256 (2d Cir. 1965), *cert. denied*, 382 U.S. 949, this Court upheld a warrantless arrest in a private dwelling by Treasury agents acting under statutory authority substantially identical to the statutory authority of F.B.I. agents to make arrests on probable cause without warrants. 18 U.S.C. § 3052. See also, *United States* v. *Burnett*, 526 F.2d 911 (5th Cir.), *cert. denied*, 425 U.S. 977 (1976). But see, *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970); *United States* v. *Shye*, 492 F.2d 886 (6th Cir. 1974); and *Vance* v. *North Carolina*, 432 F.2d 984 (4th Cir. 1970).

Nor was the method of entry of the officers into Sally Di Stefano's house improper. The record shows that guns were not drawn and that the officers were let into the house by Sally or one of her children. Because there was no forced entry, there was no concomitant requirement that, in advance of entering, the officers announce their purpose. See *United States* v. *Lozaw*, 427 F.2d

911, 915 (2d Cir. 1970); *United States* v. *Morell*, 524 F.2d 550 (2d Cir. 1975); *Sabbath* v. *United States*, 391 U.S. 585 (1968). Cases cited by appellant *Miller* v. *United States*, 357 U.S. 301 (1958); *Katz* v. *United States*, 389 U.S. 347 (1967); and *Chambers* v. *Maroney*, 399 U.S. 42 (1970), do not require a different conclusion. These cases are authority for police officers to enter private premises to effectuate arrests where there is a risk that suspects or evidence might vanish. See 357 U.S. at 305; 399 U.S. at 52; 389 U.S. at 355 n. 16.

With respect to the question of Detective Christie's entry into Sally's bedroom, the Government submits that there was no search incident to her arrest. There simply was no evidence that Detective Christie or any other arresting officer searched the bedroom. The evidence was that Detective Christie saw the bank bag in plain view at the bottom of a closet Sally had opened. Hence, we submit that the detective's observation and subsequent seizure of the bank bag was permitted under *Harris* v. *United States*, 390 U.S. 234 (1968) ("objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."). It was apparent from Detective Christie's testimony that the decision to enter Sally's bedroom was based on the need to observe Sally at all times; the closet was not visible from the doorway. (27). Indeed, Judge Platt found that Detective Christie's decision to observe Sally while she reached into the closet was properly motivated by the need for self-protection. (81-83). That finding, we submit, was proper. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-73 (1971). This Court has ruled that entry by police into additional rooms of a private residence after arrest may be justified, and resulting seizures admissible, by a need to keep a "watchful eye" on a suspect. *United States* v. *Montiell*, 526 F.2d 1008, 1010 (2d Cir. 1975). Further, this Court

has stated that such entries may be properly motivated by the need to bring a suspect to a room where the suspect can dress for transport to court or law enforcement headquarters. *United States* v. *Titus*, 445 F.2d 577 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971); *see United States* v. *Catanzaro*, 282 F. Supp. 68 (S.D.N.Y. 1968) (Weinfeld, *J.*). In the instant case, identical considerations were involved.[6]

POINT II

Sally Di Stefano's Partial Identification by a Bank Witness Was Properly Allowed Into Evidence by the Trial Judge and Defense Counsel was Given Sufficient Opportunity to Attack the Identification.

Sally Di Stefano alleges that the testimony of Marianne Wojciehowski, the bank's drive-in-window teller, was improperly received into evidence. Specifically, appellant avers that Ms. Wojciehowski's testimony that Sally looked "like [she] might be" the woman who drove the bank robbers' car was tainted by an out-of-court confrontation between the witness and Sally. The confrontation occurred when Sally was sitting outside the courtroom at the time the witness was escorted to the witness room by FBI Agent Sweeney. Further, appellant alleges that the identification constituted incompetent evidence

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[6] Appellant's trial counsel did not advance any argument to support his motion that the currency handed by appellant to the female detective should have been suppressed. We submit that this currency, which had not been seen until Sally handed it to her, was voluntarily given and hence the motion to suppress that evidence was properly denied. See *United States* v. *Watson*, *supra* at 424-25; *United States* v. *Messina*, 507 F.2d 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 993 (1975); *United States* v. *Cachoian*, 364 F.2d 291 (2d Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967), 393 U.S. 1044 (1969); *United States* v. *Burgos*, 269 F.2d 763 (2d Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

since Ms. Wojciehowski had neither the ability nor the opportunity to view the car driven on the day of the robbery. To support her position, appellant cites Ms. Wojciehowski's testimony that she was not wearing her glasses when she saw the woman car driver and that she only saw the woman for a couple of seconds. Lastly, appellant argues that the trial judge erred in not granting defense counsel a requested hearing on the circumstances of the out-of-court confrontation. None of appellant's arguments, however, are supported by the record.

Initially we note that prior to Ms. Wojciehowski's testimony the Government made a timely disclosure of the out-of-court confrontation. (254-55). The weaknesses in the identification, i.e. lack of eyeglasses and shortness of time in which the witness had to observe the driver, were brought out by the Government on direct examination and were the subject of thorough cross-examination by defense counsel. (260-65). Further, the trial judge permitted defense counsel, out of the presence of the jury, the opportunity to examine Agent Sweeney on the circumstances of the out-of-court confrontation. At this hearing, Agent Sweeney testified that he was unaware that Sally was in the hallway when he had escorted the witness to the witness room. He further did not know of Sally's location until the witness pointed Sally out to him as someone the witness recognized. (276-77). And, perhaps most important, the incident had occurred after the time the trial judge had set for the attorneys and defendants to be in the courtroom. (277). The judge found that the identification that occurred outside the courtroom had been accidental, and that if anyone was at fault it was Sally Di Stefano who, had she been in the courtroom at the time the court had required, would not have been seen by the witness. (281-82).

We submit that the situation in the instant case has a marked resemblance to *United States* v. *Gentile*, 530

F.2d 461, 468-69 (2d Cir. 1976). In *Gentile*, a Government witness recognized the defendant in the corridor outside the courtroom as someone the witness "had previously met," though the witness could not link the *Gentile* defendant to any particular occurrence. This Court, holding the decision of the trial judge to allow into evidence the identification of the defendant by the witness to be proper, stated:

> There is no claim that the out-of-court confrontation was in any way anticipated or arranged by the government. Therefore the dangers of improper influence that prompted the requirement in *United States* v. *Wade*, 388 U.S. 218 . . . that counsel be notified of an impending identification procedure were not present here . . . There was no showing that the in-court identification was the result of an impermissibly suggestive confrontation. . . .

Id. at 468. Also see *United States* v. *Kaylor*, 491 F.2d 1127 (2d Cir. 1973), *vacated on other grounds*, 418 U.S. 909 (1974). On the basis of the record, the same conclusion supporting admission of the identification testimony should be reached in the instant case.

Lastly, there was no requirement, as appellant argues, that Ms. Wojciehowski's partial identification of Sally Di Stefano satisfy any specific criteria, in terms of clarity of eyesight and length of time of observation, to allow its introduction into evidence. Although there may be such requirement where there has been an impermissibly suggestive out-of-court identification, *United States* v. *Wade*, 388 U.S. 218 (1967); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973), there is no such requirement absent such circumstances. Indeed, the weight to be accorded an

in-court identification is normally a question for the jury. See *United States* v. *Gentile, supra*, at 469; *United States* v. *Gerry*, 515 F.2d 130, 137 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). Thus, the jury was entitled to give the partial identification in this case as much weight as it saw fit. The rights of appellant Sally Di Stefano were sufficiently safeguarded, with respect to that identification, through the opportunity afforded her counsel to cross-examine the witness, particularly in light of the Government's disclosures. Perhaps, most important, defense counsel did not object to the identification on the ground that a proper foundation was lacking. Therefore, absent plain error, this issue, we submit, is not available for review by this Court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

POINT III

Appellant Sally Di Stefano Was Adequately Represented by Counsel.

Sally Di Stefano argues that she was inadequately represented by counsel at trial and that therefore her Sixth Amendment rights were violated. She argues that this inadequate representation was shown by: (1) his private statement to her that he felt uncomfortable practicing before the trial judge and that he did not wish to represent her in a related civil action; (2) his failure to ask, on July 26, 1976, for an adjournment of the trial; (3) his failure to subpoena or call helpful witnesses; (4) his failure to press for a bill of particulars; (5) his failure to move to suppress evidence on Fourth Amendment grounds; (6) his private statement to her that he "did not know federal law"; (7) his failure to effectively rebut the probation report and effectively conduct the sentencing hearing; and (8) his poor summation.

None of these points have any merit. Initially, this Court should not credit the self-serving statements made by appellant concerning private conversations between herself and her trial counsel. Such alleged conversations are not part of the record on appeal and may not be considered by this Court. See *United States* v. *Cohen*, 489 F.2d 945 (2d Cir. 1973). Nor should appellant's claim that her counsel failed to seek an adjournment be credited. The record clearly shows that an adjournment was sought by trial counsel on July 26, 1976, prior to the selection of a jury, and that this request was denied by the trial judge. (6). As was discussed above, appellant's trial attorney did make a motion to suppress the materials taken from appellant and her home, and he vigorously cross-examined the Government's witnesses at the hearing (as well as at the trial). Appellant's contention that her trial counsel failed to call witnesses is not substantiated by the record and involves the area of trial strategy, which cannot be grounds for a showing of inadequacy of counsel. *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331-2 (2d Cir. 1974) and case cited therein. Witnesses were called to refute the Government's evidence on Sally's conduct at the time of her arrest and to refute the inference that Sally had illegally come into possession of the money she surrendered. Further, the record shows that discovery was conducted. (See 8-10).

A review of the transcript of the November 26, 1976 sentencing hearing shows the appellant's trial counsel vigorously contested various aspects of the probation report and succeeded in having the Court hold that several portions thereof be disregarded. (See H, 8, 14, 16-17). Government witnesses at the sentencing hearing were thoroughly cross-examined and the defendant took the stand in her own behalf.

Insofar as trial counsel's summation is concerned, we note that it covered thirty pages of transcript and we

submit that a reading of the summation shows that it forcefully set forth a defense. We contend that this summation was not inadequate and note that this Court has discussed the difficulty in judging the effectiveness of argument by counsel to a jury on appellate review. *Rickenbacker* v. *Warden*, slip op. at 1063, 1072 (2d Cir. 1976 December 22). Indeed, hindsight always produces newly discovered wisdom. But this does not mean, as here, that the original summation was inadequate.

Most significant, we contend is that the trial judge expressly stated that he had been favorably impressed with the performance of appellant's trial counsel.[7] See *Rickenbacker* v. *Warden*, *supra* at 1073. Indeed, we submit that a thorough review of the record supports this opinion of the trial judge and will show that the conduct of the defense by Sally Di Stefano's trial counsel more than met the standards for judging competency set out in *Rickenbacker* v. *Warden*, *supra*.

POINT IV

Appellant Sally Di Stefano's Miscellaneous Claims Are Without Merit.

In Point IV of her brief, appellant Sally Di Stefano sets forth various arguments for reversal of her conviction. These contentions have been "set forth . . . without comment by her appellate counsel" (Brief of Sally Di Stefano, p. 28). None of these contentions have merit.

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[7] On October 22, 1976, the date on which Sally Di Stefano was originally to be sentenced, the Judge stated: "I will say that based on my observation of Mr. Scotto, that he is a very competent lawyer." (Hearing minutes of October 22, 1976).

Appellant states that the presentence report should not have been "accepted" by the Court. She further objects to the Court's allowing testimony at the sentencing hearing from a physician. She claims that his testimony was inadmissible hearsay. In response, we note that Judge Platt fully considered the objections of appellant to the presentence report and held a full sentencing hearing where both the Government and appellant called witnesses and appellant Sally Di Stefano, herself, testified. Further, as the record of the hearing shows, the physician who testified did have first-hand knowledge of the incident which is of concern to appellant. (H. 45-48).[8] This information was properly before the court. It constituted necessary imposition of sentence. Indeed, this Court has noted that "[a] sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the [person] before [him].'" *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Also see, *United States* v. *Rosner*, slip op. at 1641 (2d Cir. Feb. 1, 1977). Certainly, therefore, there was no error in the court's utilizing this information.

Appellant next contends that the charge was improper in that the jury was instructed that it "could convict on circumstantial evidence." We submit that appellant has misconstrued the law and that the Court's charge on circumstantial evidence was standard and was entirely proper. See *United States* v. *Botsch*, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967).[9]

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[8] The incident involves Sally Di Stefano's visit to her physician shortly prior to trial where she disturbed other patients and stated that she might "kill the various people in the court." (H. 45-47).

[9] The portions of the Court's charge that deal with Circumstantial evidence are set out in the Appellant's Joint Appendix (A. 449-51).

The death of Blanda on the eve of trial is also raised as an issue. Appellant now asserts that Blanda had told his mother "two days before his death" that he would testify on behalf of Sally and suggests that Blanda's death should be investigated. Initially, we note that this information was not provided to the District Court and therefore should not be considered here. *United States* v. *Cohen*, *supra*. Further, we note that F.B.I. investigation has revealed that Blanda's death was unrelated to this case. In any event, the Government should not be held accountable for his unavailability. See *United States* v. *Ping*, slip op. at 2063 (2d Cir. February 28, 1977).

Sally next alleges that her sentence was unduly harsh in comparison to that given to her sister. We note that Linda Di Stefano's sentence has not been fully determined; Judge Platt sentenced Linda to a period of observation and study, not to exceed sixty days, pursuant to 18 U.S.C. § 5010(e). Further, it is clear that the evidence showed a more comprehensive involvement by Sally in the crime than that of Linda. In any event, this Court has "recently reaffirmed the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976).

Lastly, appellant asserts that "she was severely abused and bruised at the time of her arrest" (brief at 28). No such allegation was put on the record by appellant at the time of the suppression hearing when such an assertion would have been proper and may have been relevant. Appellant chose not to testify at the hearing where her testimony could not later have been used by the Government on the question of guilt. See *Simmons* v. *United States*, 390 U.S. 377 (1968).

Finally, we submit that for the above-stated reasons, Sally Di Stefano's contentions should be rejected by this Court.

POINT V

The Trial Judge Properly Denied Linda Di Stefano's Motion For a Judgment of Acquittal.

Linda Di Stefano argues that the denial by the trial judge of her motion for a judgment of acquittal was erroneous. She asserts that the evidence against her was insufficient to link her to the substantive charges or to the conspiracy in various respects: there was no testimony that she was informed of the plan to commit the bank robbery before she went into the bank; there was insufficient evidence to show that she had consciously assisted the bank robbers in an active way; and there was no evidence to show that she received any bank robbery proceeds or had any other stake in the venture. Appellant further asserts that even if she had conveyed information on the position of bank cameras to Edward and Blanda, such an action could have been in support of what Linda may have thought at the time was a false check cashing scheme or even some lawful enterprise.

We submit that viewed in the light most favorable to the Government as this Court must, *Glasser* v. *United States*, 315 U.S. 60 (1942), the evidence was adequate to support the jury verdict. The evidence showed that Edwards and Blanda were concerned about the position of the cameras in the bank and whether there would be a guard present. These two men had gone to the bank approximately one month before the robbery to check out these items, but, being unsure of themselves, a last minute look early on the day of the robbery was thought desirable. After returning from the bank to the car driven by Mary Lou Morra, Linda Di Stefano who had been *told* "to see if the guard was there", reported that the cameras were in the same position as previously and that there was no guard present. (115). Armed with the information pro-

vided by Linda Di Stefano, Blanda crouched to avoid being photographed while he worked in the teller's area. We submit that these events were not isolated ones. The surveillance of the bank by Linda occurred while Edwards and Blanda were in transit to Sally's home to obtain their transportation and disguises.

Based on this evidence, which was corroborated by the testimony of Mary Lou Morra and Linda Di Stefano's false exculpatory statement, the motion for judgment of acquittal was properly denied. There is no requirement that a defendant's link to an enterprise be established by direct evidence. Wilful participation in the enterprise, may be certainly proven through circumstantial evidence. *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Cassino*, 467 F.2d 610, 618 n.21 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973); *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971). Further, no particular quantum of evidence is necessary to prove the connection between the criminal enterprise and a particular defendant. The Courts have repeatedly held under some circumstances that proof of the commission of a "single act" is sufficient, if those circumstances justify an inference that there was knowledge of a broader conspiracy. *United States* v. *D'Amato*, 493 F.2d 359, 365 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

We submit that Linda Di Stefano's acts [10] played a substantial role in the bank robbery here. They were not isolated in time and place from the central events of the crime. Neither were her acts committed essentially out of the view of the three other persons involved in the

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[10] Linda's false exculpatory statement was an act which could properly be viewed as an effort to conceal the conspiracy. See *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

conspiracy, which involved a single brief event. See *United States* v. *Torres*, 503 F.2d 1120, 1123-4 (2d Cir. 1974). Blanda and Edwards were with her when she went to the bank and the three immediately proceeded to meet Sally at her home. Essentially, Linda's conduct was a necessary part of the final stages of preparation and indeed permitted the bank robbery to initially succeed. The failure to prove that she received financial reward is of no consequence. Her affection, loyalty and desire to have the other defendant's succeed, given her actions in the case and relationship with the defendants, established that she had a substantial stake in the success of the venture for it.[11] The Cases cited by appellant do not require a contrary result. These cases either involve "mere presence" of a defendant at crime, equivocation by a defendant about or disassociation by a defendant with a venture, or participation by a defendant in criminal preparation which could only provide for him vague clues on the venture's purpose. *United States* v. *Cirillo*, 499 F.2d 872, 884-85 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975); *United States* v. *Gallishaw*, 428 F.2d 760 (2d Cir. 1970); *United States* v. *Infanti;* 474 F.2d 522 (2d Cir. 1973); *United States* v. *Cianchetti*, 315 F.2d 584 (2d Cir. 1963). Thus, none of these decisions are applicable here.

Finally, we submit that this Court's recent decision in *United States* v. *Mariani*, 539 F.2d 915 (2d Cir.,

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[11] In the context of this case, this Court should not accept appellant's argument that Edward's failure to recollect conversations with Linda requires a finding that such conversations did not take place. Linda's trial counsel never requested such a jury instruction of the trial judge. In addition, while he vividly recalled various activities and events, Edwards was not extensively examined as to the conversation of the participants. In any event proof of a person's acts may be sufficient to establish a conspiracy. *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

1976), is controlling. The evidence against *Mariani* was briefly stated by this Court:

> A surveillance team . . . saw Mariani and Acevedo enter the cab . . . Acevedo sat in the rear while Mariani drove. Mariani drove past the bank once and then returned and double parked, keeping the motor running. Acevedo, carrying a manila envelope, twice glanced back at the cab before entering the bank. After two to five minutes, Mariani sped off, engaging in extraordinary traffic maneuvers before he abandoned the cab. His own car was found parked on the very block where he was first seen entering the cab.

This Court held that the evidence was not "insufficient to support the jury verdict as a matter of law." The Court further stated that "Mariani's actions during the surveillance period could support an inference by the jury that he was to be the getaway driver for the robbery." 539 F.2d at 920.

As in *Mariani*, there was direct evidence linking Linda Di Stefano to the bank robbery. Like Mariani, Linda Di Stefano was, at a critical time, at the bank and assisting perpetrators of the crime. Moreover, in this case there was evidence not present in *Mariani*: accomplice testimony explaining the purpose of the defendant's actions. Thus, the jury's verdict was amply supported by the evidence adduced at trial.

POINT VI

The Court's Jury Charge on Linda Di Stefano's false Exculpatory Statement Was Not Plain Error.

Appellant Linda Di Stefano assigns as error that part of the charge dealing with her false exculpatory statement. The trial judge stated, in relevant part:

> Evidence has been introduced that the defendant in this case, Linda Di Stefano, made certain exculpatory statements or claimed statements outside of this courtroom, explaining her actions.
>
> If the jury finds such statements were untrue and the defendant made them with knowledge of their falsity, the jury may consider the statements as circumstantial evidence of the defendant's guilt. (484-A).

Appellant argues that this "instruction qualitatively overstated the value of such evidence. False exculpatory statements are admissible not as evidence of guilt, but as evidence of consciousness of guilt." (Brief of Linda Di Stefano at 20). It is not disputed that "exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness . . ." *United States* v. *Lacey*, 459 F.2d 86, 89 (2d Cir. 1972). Thus appellant's argument rests on the failure of the trial judge to include the word "consciousness" or "conscious" in this portion of his charge.

However, neither defense attorney objected to this portion of the charge. Hence, any defect in the charge requires reversal only if such defect constitutes plain error. *United States* v. *Pelose*, 538 F.2d 41 (2d Cir. 1976); *United States* v. *Montalvo*, 271 F.2d 922 (2d Cir.

1959), *cert denied*, 361 U.S. 961 (1960). In *Montalvo*, this Court faced this very issue where review was sought of a charge concerning a false exculpatory statement, to which no objection had been made. The *Montalvo* trial court had instructed the jury that a false exculpatory statement was "independent evidence of guilt." [12] Citing Rule 30 of the Federal Rules of Criminal Procedure, this Court ruled that failure of defense counsel to object to the charge precluded objection on appeal.

We submit that *Montalvo*, combined with the "plain error" rule should be dispositive. *Cf. United States* v. *Baratta*, 397 F.2d 215 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968).

POINT VII

The F.B.I. Agent's Good Faith Destruction of Rough Interview Notes After Preparation of the Typewritten Statement Reflecting Linda Di Stefano's Arrest Interview Does Not Warrant Reversal of her Conviction.

Agent Sweeney's interview with Linda Di Stefano on June 2, 1976, the date of her arrest, was originally written in rough form. The agent, within the next five days, dictated his notes and destroyed the original rough copy. He did this only after comparing the typed copy against the rough notes for accuracy. (371-72).

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[12] The charge in *Montalvo* had also included a statement that false exculpatory statements "are circumstantial evidence of a guilt consciousness and have independent probative value." However, the phrase "evidence of guilt" was not limited by the *Montalvo* trial judge.

Appellant Linda Di Stefano now contends for the first time in this appeal, that the destruction of the rough interview notes constitutes error, warranting reversal of her conviction. Appellant cites decisions by the Ninth and District of Columbia Circuits holding that the FBI must thereafter preserve rough notes taken by FBI agents during interviews of prospective witnesses. *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975). However, in both those cases the Courts held that the circumstances did not warrant imposition of any sanctions.

This Court, of course, has not held that rough interview notes must be preserved. While one panel of this Court indicated that the better practice would be to preserve the notes, see *United States* v. *Thomas*, 282 F.2d 191, 194 (2d Cir. 1960), the majority of cases in this Circuit that have discussed the matter have indicated that the practice of destroying the rough notes is not objectionable. *United States* v. *Terrell*, 474 F.2d 872, 877 (2d Cir. 1973); *United States* v. *Covello*, 410 F.2d 536, 545 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Comulada*, 340 F.2d 449, 450-51 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); *United States* v. *Greco*, 298 F.2d 247, 249-50 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962). Accordingly, "in light of the judicial approval which had been accorded the practice" the destruction of notes should not be viewed as having being done in bad faith so as to require the imposition of any sanction. *United States* v. *Harrison*, *supra*, at 434.[13]

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[13] There is no allegation by appellant that Agent Sweeney's action was done in bad faith, or that the version of the interview recorded in the report was incomplete or inaccurate. In *United States* v. *Harris*, *supra*, the lack of allegations or evidence pointing to bad faith or inaccuracy was considered to be a reason for not imposing sanctions.

Finally, we observe that Agent Sweeney was fully examined at trial by appellant's trial counsel about the destruction of these original interview notes and was examined about the manner in which his final report of the interview was prepared. (371-72). Thus, the jury had before it the full procedure under which the interview was conducted and the report prepared. Further, appellant's trial counsel did not ask for an instruction to the jury on this matter. Compare *United States* v. *Terrell, supra* at 877 (2d Cir. 1973). Under such circumstances, the good faith destruction does not warrant reversal of appellant's conviction.[14]

CONCLUSION

The judgments of conviction should be affirmed.

Dated: April 14, 1977

Respectfully submitted,

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Eastern District of New York

BERNARD J. FRIED,
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[14] This issue is *sub judice* before this Court in *United States* v. *Albert Anzalone and Anthony Vivelo*, No. 76-1458, argued February 7, 1977.

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That on the 18th day of April 19 77 he served a copy of the within

BRIEF FOR APPELLEE

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Carolyn N. Johnson

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Term Expires March 30, 19 79